71-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

KIRBY J. HENSLEY,

Petitioner,

vs.

MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT, SANTA CLARA COUNTY, STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, which affirmed the denial of a petition for a writ of habeas corpus by the United States District Court for the Northern District of California.

Opinions Below

The decision of the United States District Court for the Northern District of California denying petition for writ of habeas corpus is unreported, and is set out in Appendix "A." The District Court's order denying reconsideration, but granting a certificate of probable cause is unreported and is set forth in Appendix "B."

The decision of the United States Court of Appeals for the Ninth Circuit is officially reported at 453 F.2d 1252,

and is set out in Appendix "C." The order of the Court of Appeals denying petition for rehearing and rejecting suggestion for rehearing in banc is set forth in Appendix "D."

Jurisdiction

The judgment of affirmance of the Court of Appeals was entered on January 19, 1972. A timely filed petition for rehearing in banc was denied on February 18, 1972. By order dated March 20, 1972, Mr. Justice Douglas extended the time for filing a petition for writ of certiorari to and including May 1, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The District Court had jurisdiction under 28 U.S.C. §2241(c)(3).

Question Presented for Review

Whether or not a person released on his own recognizance following trial, conviction and sentence on a state criminal charge is within the purview of 28 U.S.C. §2241 (c)(3), which extends the remedy of habeas corpus to persons "in custody" in violation of the Constitution of the United States.

Constitutional and Statutory Provisions Involved

Article I, Section 9, of the Constitution of the United States provides, in pertinent part:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

28 U.S.C. §2241:

"Power to grant writ:

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * *

(3) He is in custody in violation of the Constitution . . . of the United States;"

28 U.S.C. §2254:

"State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . . of the United States."

Statement

Petitioner, KIRBY J. HENSLEY, convicted of a misdemeanor in the state court,[1] and presently enlarged on his own recognizance,[2] filed a petition for writ of habeas corpus in the United States District Court for the Northern Dis-

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[1] Hensley was sentenced to one year in jail plus $625 fine and penalty assessment for violation of California Education Code §29007, which prohibits the award of Doctor of Divinity degrees without requisite accreditation.

[2] Hensley has been enlarged on recognizance at all times since his conviction. Initially, the state court stayed execution of sentence. At the exhaustion of Hensley's state remedies, the district court issued a stay of execution pending habeas proceedings therein. After the petition was denied, the Circuit Justice granted a stay pending appeal to the Court of Appeals. Following the affirmance of the denial of habeas corpus, the Court of Appeals granted a 30 day stay of its mandate pending application for certiorari. This stay was subsequently extended by the Circuit Justice pending the timely filing of a petition for a writ of certiorari.

trict of California, challenging the constitutionality of the state conviction.[1]

The District Court did not reach any substantive issues, but denied the petition on the ground that petitioner, being enlarged on his own recognizance, was not "in custody" for purposes of 28 U.S.C. §2241(c)(3).

The Court of Appeals affirmed, relying upon its previous dictum, in *Matysek v. United States*, 339 F.2d 389 (9th Cir. 1964), to the effect that a person released on bail was not "in custody", actual or constructive, so as to satisfy 28 U.S.C. §2241. The Court of Appeals specifically noted, however, that "the decisional rule is different in several other circuits" and that "the Supreme Court has not, to this date, considered the express question posed herein."

It is to review that ruling that the present petition for certiorari is filed.

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[1] The grounds for this Constitutional challenge are, briefly, as follows: 1) denial of free exercise of religion, by the imposition of punishment for essentially religious activity in awarding honorary Doctor of Divinity certificates to individuals who complete a course of religious instruction, and 2) denial of due process of law and effective assistance of counsel, by the failure of trial counsel to appear and present any defense of fact or law that was available to petitioner when the trial court re-opened the case after having initially stayed the proceedings to determine if it had jurisdiction, and by the imposition of judgment of conviction *in absentia*.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME

The Decision Below Admittedly Conflicts With Decisions of Other Courts of Appeals Which Hold That State Prisoners on Bail Are "In Custody" for Federal Habeas Corpus Purposes, and It Arguably Conflicts With Applicable Decisions of This Court.

The Court below candidly acknowledged that its limited construction of the term "in custody," as used in 28 U.S.C. §2241(c)(3), was a minority view. Many of the other circuits have held that state prisoners on bail are "in custody" for federal habeas corpus purposes.[4] Indeed, the Ninth Circuit itself, on other occasions, has apparently followed the majority rule.[5] And, two decades ago, this Court observed, in *Carlson* v. *Landon*, 342 U.S. 524, 547 (1952): "When a prisoner is out on bond he is still under court control, though the bounds of his confinement are enlarged. His bondsmen are his jailers."

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[4] *Marden* v. *Purdy*, 409 F.2d 784, 785 (5th Cir. 1969); *Capler* v. *City of Greenville*, 422 F.2d 299, 301 (5th Cir. 1970); *Beck* v. *Winters*, 407 F.2d 125, 126-27 (8th Cir. 1969); *Ouletta* v. *Sarver*, 307 F. Supp. 1099, 1101 n. 1 (E.D. Ark. 1970), aff'd, 428 F.2d 804 (8th Cir. 1970); *Burris* v. *Ryan*, 397 F.2d 553, 555 (7th Cir. 1968); *United States ex rel. Smith* v. *Di Bella*, 314 F. Supp. 446, 448 (D. Conn. 1970); *Duncombe* v. *New York*, 267 F. Supp. 103, 109 n. 9 (S.D.N.Y. 1967); *Matzner* v. *Davenport*, 288 F. Supp. 636, 638 n. 1 (D.N.J. 1968), aff'd, 410 F.2d 1376 (3rd Cir. 1969). Interestingly, the California Supreme Court has already held that a person released on recognizance is under sufficient constructive custody to permit him to invoke the Writ of Habeas Corpus. See, *In Re Smiley*, 66 Cal.2d 606, 58 Cal. Rptr. 579, 427 P.2d 179 (1967).

[5] *Settler* v. *Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969); *Settler* v. *Lameer*, 419 F.2d 1311 (9th Cir. 1969); *Cantillon* v. *Superior Court*, 305 F. Supp. 304, 306-07 (C.D. Cal. 1969), rev'd on other grounds, 442 F.2d 1338 (9th Cir. 1971); *Choung* v. *People of State of California*, 320 F. Supp. 625 (E.D. Cal. 1970).

In addition, recent decisions of this Court and the 1966 amendments to the federal habeas corpus statute, have combined effectively to undermine, if not actually overrule, the 1964 *Matysek* dictum, which the Court below felt "constrained" to follow.

In *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963), this Court said:

> "[The writ of habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."

In *Carafas* v. *La Vallee*, 391 U.S. 234, 239 (1968), the Court stated:

> "the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that '[t]he court shall . . . dispose of the matter as law and justice require.' 28 U.S.C. §2243. The 1966 amendments to the habeas corpus statute seem specifically to contemplate the possibility of relief other than immediate release from physical custody. At one point, the new §2244(b) (1964 ed., Supp. II) speaks 'in terms of 'release from custody or other remedy.'"[4]

As this Court emphasized in *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969):

> "The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut

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[4] *Carafas* has been applied to authorize federal habeas challenges to convictions already served. *Stotts* v. *Peyton*, 427 F.2d 1296 (6th Cir. 1970); *United States ex rel. Lawrence* v. *Woods*, 432 F.2d 1072 (7th Cir. 1970).

through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."

Peyton v. *Rowe*, 391 U.S. 54 (1968), actually applied the federal habeas corpus remedy to questions of *future* release. There, the Court overruled *McNally* v. *Hill*, 293 U.S. 131 (1934), and said:

> "to the extent that the rule of *McNally* postpones plenary consideration of issues by the district courts, it undermines the character of the writ of habeas corpus as the instrument for resolving fact issues not adequately developed in the original proceedings."
> 391 U.S., at 73

> "Rowe and Thacker may establish that the convictions they challenge were obtained in violation of the Constitution. If they do, each day they are incarcerated under those convictions while their cases are in the courts will be time that they might properly have enjoyed as free men." Ibid., at 64

The limited interpretation of the federal habeas corpus statute by the court below renders the Great Writ a "narrow, formalistic remedy," contrary to the clear implications of this Court's decisions mentioned above. The majority view, on the other hand, realistically observes: "The fact that petitioner was forced to seek a federal stay order to fend off state incarceration is itself a significant restraint 'not shared by the public generally.'" *Choung* v. *People of State of California*, 320 F. Supp. 625, 628 (E.D. Cal. 1970).

Moreover, in civil rights cases, where the validity of a state statute may be drawn in question, the defendant on bond[1] would be forced under the Ninth Circuit rule, to surrender himself into the confines of an often decrepit, overcrowded penal institution, before the federal habeas judge would have the opportunity to pass upon the constitutional challenge.[2] Such an unjust result would be justified by neither common sense nor by a correct reading of 28 U.S.C. §2241(c)(3).[3]

CONCLUSION

The Ninth Circuit has practically invited this Court to review this case. By virtue of the granting of federal stays, as well as of a certificate of probable cause, the issue posed herein has been preserved. For the foregoing reasons, the petition for certiorari to review the decision of the Ninth Circuit Court of Appeals should be granted,

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[1] Any attempt to distinguish between release on recognisance and release on cash bail would ignore the fact that the imposition of non-financial conditions constitutes a string on one's liberty to come and go as one pleases, and further, would raise serious equal protection problems of discrimination against indigents, whose only means of obtaining such conditional release is by individual recognisance.

[2] Under this Court's decisions in the septet beginning with *Younger* v. *Harris*, 401 U.S. 37 (1971), a civil suit challenging the constitutionality of a state statute, and seeking to enjoin prosecution thereunder, could not be maintained in federal court, absent a showing of "bad faith" enforcement.

[3] The limited construction of the habeas remedy by the court below may also raise a question of unconstitutional suspension of the "Privilege of the Writ of Habeas Corpus," guaranteed by Article I, Section 9 of the Constitution of the United States.

and the judgment should be reversed and remanded for further proceedings.

Respectfully submitted,

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